One of the biggest complaints about arbitration is the potential for trial by ambush because discovery is often more limited in arbitration than in ordinary civil litigation. Under the American Arbitration Association’s Commercial Arbitration Rules, for example, there is no express right to take discovery depositions before arbitration hearings commence. In a similar vein, because arbitral rules regarding prehearing discovery are only binding on the actual parties to the arbitration, it is often difficult to obtain evidence in advance of a hearing from third persons or entities who are not parties to the arbitral proceedings.

To aid parties seeking to obtain evidence from nonparties, federal law and most analogous state arbitration statutes authorize arbitrators to issue subpoenas to third-party witnesses. Under Section 7 of the Federal Arbitration Act (FAA), for example, arbitrators may “summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” The subpoena must be served “in the same manner as subpoenas to appear and testify before the court,” and, if ignored, a party may “petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting . . . [to] compel the attendance of such person or persons . . . for contempt.”

This seemingly straightforward provision raises at least two questions with respect to obtaining evidence in advance of an arbitration. First, does Section 7 permit arbitrators to subpoena third parties for purposes of obtaining prehearing discovery? Second, if Section 7 only authorizes arbitrators to issue subpoenas to obtain evidence, must an arbitration panel wait for evidentiary hearings to begin before commanding a third party to testify or produce documentary evidence?

**Subpoenas Not Considered Prehearing Discovery**

The Second Circuit was recently presented with both questions in *Stolt-Nielsen SA v. Celanese AG.* Stolt-Nielsen, SA, several Stolt-Nielsen affiliates, and its former counsel (collectively, Stolt) appealed a federal district court’s denial of motions to quash five subpoenas issued in connection with a pending arbitration. Stolt, which was not a party to the arbitration, argued that the subpoenas were invalid because they were “a thinly disguised effort to obtain . . . pre-hearing discovery” in contravention of Section 7 of the FAA. Stolt conceded that the information sought was material to the arbitration and that the arbitrators could subpoena company witnesses to testify during a merits hearing conducted before the panel.

What “fuel[ed]” Stolt’s objection was the timing of the subpoena. Stolt pointed out that the subpoena was returnable during the period that the arbitrators scheduled for fact depositions and was ten months in advance of the commencement of a hearing on the merits. Stolt’s view, by requiring its witnesses to appear and produce documents ten months before the merits hearing, the claimant and the arbitrators impermissibly conspired to “circumvent Section 7’s limitations through the contrivance of conducting its discovery in the presence of the arbitrators.”

The Second Circuit disagreed. Writing for a unanimous panel, District Judge Mark Kravitz (sitting by designation) acknowledged that “open questions remain as to whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties.” The Second Circuit, however, concluded that it was unnecessary to resolve that issue because “the subpoenas in question did not compel pre-hearing depositions or document discovery from non-parties.” Rather, because the subpoenas required Stolt to appear and provide documents in the presence of “the arbitration panel itself at a hearing held in connection with the arbitrators’ consideration of the dispute,” the subpoenas could not be characterized as seeking prehearing discovery.

In reaching this conclusion, the Second Circuit emphasized these facts:

- The Stolt witnesses were not ordered to appear for depositions, which would customarily take place outside the presence of the arbitration panel.
- The arbitrators resolved evidentiary and privilege objections during the testimony of the Stolt witnesses, rather than reserving them for time of trial.
- The testimony became a part of the arbitration record.

In the court’s view, “the mere fact that the session before the arbitration panel . . . was preliminary to later hearings that the panel intended to hold does not transform the . . . hearing into a discovery device.” It therefore endorsed District Judge Rakoff’s conclusion that “[n]othing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing.”

**Practicality of Stolt Holding**

The Second Circuit’s analysis and holding in *Stolt,* if followed by other federal courts, affords parties to an arbitration some much needed flexibility in gathering evidence from third-party witnesses. In *Stolt,* for example, the facts reflected that it would not have been practical for the claimant to wait for a merits hearing before seeking documents and testimony from the recalcitrant third-party witnesses. As the Second Circuit observed, Stolt produced more than 300 boxes of documents in partial compliance with the subpoena, and the arbitration panel was forced to resolve numerous relevance and attor-
ney-client privilege objections that Stolt witnesses asserted during their testimony.\(^1\) Under the circumstances, it was far more practical for the arbitrators to allow the claimant to press its document production requests and its examination of Stolt witnesses before a merits hearing, rather than having the hearing bogged down with resolving these threshold evidentiary issues.

The Second Circuit’s decision might also make it more practical for parties to enforce subpoenas against out-of-state third-party witnesses. FAA Section 7 provides that an application to enforce an arbitrator-issued subpoena must be filed in a district court where the arbitrator is “sitting.”\(^18\) Moreover, FAA Section 7 incorporates the territorial limitation on the service of subpoenas set forth in Rule 45(c) of the Federal Rules of Civil Procedure.\(^19\) Accordingly, if the arbitration panel is deemed to be sitting only in the district where the merits hearing is scheduled to occur, the FAA would not provide a basis to compel the third party’s testimony. Instead, the party seeking the testimony would need to file a motion in the state court where the arbitration is taking place, pursuant to the applicable state arbitration statute, for an order permitting out-of-state depositions and then, if successful, would need to enforce the order in the state court where the witness resides.

Stolt suggests that, under the FAA, there may be a way around this cumbersome process. If the arbitrator and the parties are willing to travel to the locale of the recalcitrant third-party witness to conduct an examination, the logic of Stolt suggests (although not conclusively) that the arbitrator’s presence could render an arbitral subpoena enforceable, despite the territorial limits of the FAA.\(^20\) Moreover, given Stolt’s holding that such subpoenas may be served in advance of evidentiary hearings on the merits, having the arbitrator travel to the locale of third-party witnesses in advance of the merits hearing may offer a practical alternative to the time-consuming process of attempting to enforce arbitral subpoenas through multiple state court proceedings.

Unresolved Question

Stolt expressly leaves unresolved whether Section 7 of the FAA permits a party to subpoena a third-party witness twice, i.e., once for a discovery deposition and a second time for a merits hearing. Because the weight of authority holds that Section 7 does not authorize discovery depositions,\(^21\) a party serving a prehearing subpoena would be wise to assume that it will not get “two bites at the apple” and should conduct its prehearing examinations of third-party witnesses accordingly.

Endnote

1. Some arbitration rules permit discovery depositions. For example, JAMS Rule 17(c) provides that “[e]ach party may take one depo-

3. Id.
4. 430 F.3d 567 (2d Cir. 2005).
5. Id. at 577.
6. Id.
7. Id.
8. Id.
9. Id.
11. Id. at 569.
12. Id.
13. Id. at 578.
14. Id.
16. This is far from a settled area of the law. For example, the Eighth Circuit has held that the FAA authorizes arbitrators to issue subpoenas, but not depositions, for prehearing document production outside their presence. See In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000). In contrast, in Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 408–09 (3d Cir. 2004), the Third Circuit held, in an opinion authored by now Supreme Court Justice Samuel Alito, that an arbitrator-issued document production subpoena was valid only if it required a nonparty to actually appear at a hearing before the arbitration panel.
17. Stolt-Nielsen SA, 430 F.3d at 571.
19. Id.
20. One federal district court has held that the territorial limits under the Federal Rules of Civil Procedure did not preclude enforcement of a subpoena requiring a third party to produce documents but would prevent the enforcement of a subpoena to compel the prehearing testimony of the nonparty witness. Schlumbergersema, Inc. v. Xcel Energy, NO. CIV. 02-4304PAMJSM, 2004 WL 67647 (D. Minn. Jan. 9, 2004).